No. 14245

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,

Appellant,

vs.

ALBERT GONZALES,

Appellee.

Appeal from the United States District Court for the Eastern District of Washington, Southern Division

HONORABLE SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

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INDEX

TABLE OF CASES

TABLE OF CASES (continued)

STATUTES

PERIODICALS AND REVIEWS

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BRIEF OF APPELLEE

JURISDICTION

The appellee accepts the jurisdictional statement of the appellant.

STATEMENT OF THE CASE

The appellant's statement of the case is controverted in part as being incomplete and will be amplified because it presents, primarily, those matters relating more to the substance of the facts having to do with guilt or innocence of the appellee, while the question here, relating as it does to habeas corpus, is not involved in that issue. The statement of appellant, however, so far as it describes the crime committed is correct, though appellant has condensed the factual statement to a brevity, dangerously incomplete.

Appellee, Albert Gonzales, was a man of 45 years, without family and with an eighth grade education. He was a Filipino and had arrived in the United States from the Philippine Islands in 1929. His work had consisted primarily of menial tasks, so-called, as a cannery worker and as a mess attendant (Tr. 41-42). Appellee had never before been in trouble with the police or law enforcement agencies and had never been in a police station in his life prior to the arrest in this case (Tr. 50). Appellee, during the time of his detention (24½ hours) was not permitted to call counsel nor to contact the representative of the Philippine government in the City of Seattle. During all of that time he was confined and subjected to intermittent questioning. His arrest had occurred between 1:00 and 1:30 A. M. on Saturday morning, the 7th of Janu-

ary, 1950 (Tr. 42). Consequently, the appellee was without sleep on the evening and night of Friday-Saturday, the 6th-7th of January, 1950, and was without sleep throughout the entire day of Saturday and certainly up until the hour of 2:10 A. M. when a confession was extracted from him. (See Exhibit 2.) Consequently, the period of questioning extended in excess of twenty-four hours, while his period of sleeplessness was considerably in excess of that. The record does not disclose whether or not appellee received food (Tr. 90).

Claims were almost immediately made by appellee that he had been mistreated and beaten by officials of the Seattle Police Department. As a result thereof a line-up was had at the Seattle Police Station of the detectives for the purpose of allowing appellee and his attorney to identify those whom it was claimed by appellee had mistreated him, but neither of the detectives involved, Ryan and Thomas, was in the line-up (Tr. 107-108; 118). Likewise, as a result of appellee's complaints of mistreatment, pictures were taken of the appellee on the 9th day of January, 1950 (Tr. 144; 180; 181; 182). Just prior to the confession, detectives Seth and Sprinkle of the Seattle Police Department alternately questioned appellee for a period of about two hours and forty-five minutes (Tr. 124), although the recording used in the trial in the State Court, the text of which is set out in the transcript, involved a

playing time of only about thirty-five minutes. The confession itself was written by detective Sprinkle (Tr. 124). This confession was procured with the use of deceit by the questioners and an affected sympathy for Gonzales (Tr. 125).

A few hours after appellee's arrest on the morning of January 7th, 1950, or at 5:00 A. M., one statement was secured and then by virtue of further and continued persistent questioning, the confession attacked in this proceeding was secured about 2:10 A. M. on January 8th, 1950 (Tr. 47, 124; Exhibits 1 and 2).

The above facts are undisputed. Likewise, appellee was arrested without a warrant and was not taken before a commiting magistrate for hearing (Tr. 42, 55).

Appellee testified that upon his arrest he was taken to the Seattle Police Station and that some time after he had arrived at the police station he was questioned by a sergeant. It might be well to state here that the sergeant was not Austin Seth, and Brief of Appellant is correct where it points out that Gonzales was taken to the office of Sergeant Foster, rather than Austin Seth. (See Appellant's Brief, page 17.) At that time a lawyer was requested by Gonzales, but he was told he could not call anybody until he made a statement (Tr. 44). After this questioning, detective Ryan came in and took appellee upstairs where he again requested counsel and was refused; that then another detective

came in, identified later as detective Thomas, who appellee testified, grabbed him and pushed him up against a radiator which caused appellee's head to strike the window; that thereafter the detectives beat appellee up on the belly and below the belt about four or five times, so that it hurt "awful" (Tr. 44, 45, 46). Appellee further testified that the detective said "God damn it" and he said "punch you in the sidewalk. I'm going to kick your God damn face," he said (Tr. 46). Appellee testified that he then signed a statement, but did not implicate anybody. Appellee testified that he was then taken out to the house of Giron, another defendant in the cause, and that at such time he was threatened by the detectives with a gun. That thereafter he was further questioned, but that he was tired and his stomach was painful, and that about every five or ten minutes he was questioned and "they took me up" (Tr. 48-49). Appellee testified he had difficulty with urination after the assault; that thereafter and some time later he was questioned by detectives Seth and Sprinkle who appellee states were indulgent toward him and told him with sympathy that they were with him, but indicated that he might get another beating from some other detective, although not from either of them (Tr. 51, 52, 53). A wire recorder was used during the questioning of appellee at the time by detectives Seth and Sprinkle, and after the confession was signed, appellee was allowed to call up a friend, but not a lawyer, and he did not see a lawyer until

about Monday or Tuesday, which would have been three or four days after his arrest (Tr. 54, 55, 56).

Appellee testified that because he was beaten up "I cannot stand any more" and that he was in fear of bodily harm when he signed the confession. (Exhibit 2. Tr. 57, 91, 92.) He also testified that he told about these events in his trial in the State Court, but that he was cut off from telling the full story.

The allegations which have been set out here were disputed by the testimony of Ryan and Thomas, but the testimony of Seth and Sprinkle as to their relationship with appellee did not controvert appellee's testimony. It appears that Seth and Sprinkle affected sympathy toward appellee, and the wire recording so indicates. (Tr. 146-171 inclusive, and see Tr. 65, 66.) It is noted, however, that at page 148 of the Transcript, Gonzales states (and this was on the wire recording) "Well, of course, I will come to the clear now because I don't want to have any more beef. I've had enough now. I could make another statement, but you could break it down."

The facts in this case are undenied to the extent that detectives Thomas and Ryan had definite personal contact with appellee, although, in the State Court trial, it was made to appear when appellee claimed assault and coercion, that Thomas had had no personal contact with him whatsoever (Tr. 223-224).

ARGUMENT

Specification of Error No. 1

Answer to Specification of Error No. 1.

The right of appellee to invoke the jurisdiction of the United States District Court, despite the failure to perfect an appeal from the original conviction in the State Court, is well settled. In *Brown v. Allen,* 344 U. S. 443, the majority said at page 486:

> "Also, this Court will review state habeas corpus proceedings, even though no appeal was taken, if the state treated habeas corpus as permissible."

This language applies to the instant case because the State of Washington, having made habeas corpus available (see *In re Johnson v. Cranor,* 43 Wash. 2d 200; 260 P. (2d) 873) the instant case could be determined on the merits. This Court employed the reasoning in *Brown v. Allen,* and anticipated it in *Ekberg v. McGee,* 191 F. 2d 625, 626.

See also:

Ex parte Boyden, 205 F. 2d, 485;
Hampson v. Smith, 153 F. 2d, 417.

The appellee, Gonzales, had invoked the alternative remedy of habeas corpus in the Washington State Supreme Court after his conviction and the initiation

of his appeal which was not completed. Certiorari was denied in the Supreme Court of the United States, *Giron, et al, v. Cranor,* 344 U. S. 947.

SPECIFICATIONS OF ERROR NO. 2, 3, 4, 5, 6

B. Answer to Specifications of Error No. 2, 3, 4, 5, 6.

Appellant argues the controverted issues of fact, and the only contention with which appellee is in full agreement is the statement that (Appellant's Brief, page 17) appellee was taken to the office of sergeant Foster rather than Austin Seth. The finding in this respect was without question the result of a dictation or transcription error, and is not a matter of substance infecting the primary issue, which would require reversal of this case. Appellant also suggests some error in the fact that there is a finding that there was a magistrate available for a hearing during the detention of appellee. Appellant's Brief in that respect now proposes an argument that could have been made during the trial and in the record of this case. Appellant states that the only evidence on this point was the statement of counsel for appellee. It might be well to examine that statement in the context of the trial testimony and also in other relevant evidence. At pages 67 and 68 of the Transcript there is a statement by appellee's counsel directed specifically to the Assistant State Attorney General, in which it appears that ap-

pellee's counsel said in substance, that the Assistant Attorney General probably should be advised as to appellee's position; that the question had to be answered why it was that appellee was held in the Seattle jail when there was a magistrate upstairs who was available, etc. To this statement no answer was made by the Assistant Attorney General, who, in fact, stated that he was not going to uphold police methods if they were in fact as claimed. Furthermore, at page 146 of the Transcript, during the testimony of detective Seth, he admitted that there was a Police Court in the station, but stated that he was not sure whether the *session* is on Saturday (this would be January 7th, 1950), but that he did not believe there was a Police Court *session* on Saturday. He further stated that he made no inquiry to determine whether a *session* of the Police Court was in progress.

Of course, the answer to counsel's question by detective Seth, that he did not know and did not believe that there was a Police Court *session* in progress on Saturday has nothing to do with whether or not a magistrate was available, or could have been made available. I believe the facts, without question, show that the Police did not, and would not make a magistrate available, or even seek one, regardless of whether there was a *session* of the Court in progress during the entire day of Saturday when appellee was continuously interrogated.

Regardless of the argument which counsel makes in assigning error to the Findings of Fact, Nos. 4, 5 and 6, and the Conclusions of Law based thereon, it is perfectly obvious that such findings have clear and substantial support in the evidence heretofore recited in appellee's Statement of the Case. The Appellee showed some minor confusion at times, but certainly none as to the events that actually occurred and to the circumstances that surrounded them. This is clearly indicated by the *undisputed* facts in the record. Apart from some allegations and testimony of the appellee which appellant seeks to controvert by the testimony of detectives Ryan and Thomas, the factual findings have a firm basis in the record. The Court found adversely as to conflict of appellee with Ryan and Thomas. There is abundant evidence to justify the Court's view in its determination of controverted issues in the conflict and implications observable from the manner in which detective Thomas testified in the State Court, as compared with the manner in which he testified in the trial of the issues before the United States Judge. (See Tr. 223-224.) We would be guilty of prolixity if we were to confuse the issue before this Court with a myriad of references to the record, or conclusions derived from isolated questions and answers in the Transcript. It should suffice to say that on the factual issues appellee has recited in his Statement of the Case, which stand undisputed, there is substantial ground for each and every finding of the Court on such facts.

When those undisputed facts are considered in context and perspective with the disputed facts, the findings are fully supported. Appellee sincerely contends that the undisputed facts alone are of such positive persuasion that they establish the claim of the deprivation of Federal due process. Here we have a 45-year-old Filipino with an eighth grade education who had never been in trouble, who had never before been in a police station, who had never before had anything to do with the police, who knew nothing of criminal procedures and nothing of police methods, and who was completely unequipped to meet the coercion which was exercised by the officers of the Seattle Police Department. It is quite appropriate to emphasize that the coercion which the Court examines can be of a physical or psychological character. One can be as deadly as the other in its violation of due process. This record is replete with the exercise of coercion of physical and psychological character, and the undisputed evidence indicates a wilful disregard by the police, for the State laws which should govern their conduct in the handling of matters of this kind. This Court has had occasion to consider the Washington statute which is applicable and has spoken before as to the intendment of that statute.

In *Runnels v. U. S.*, 138 Fed. 2d, 346, the Court stated at Page 348:

> "The United States attorney suggested at the oral argument that it was not certainly known until the confession was obtained whether the killing had occurred on the Reservation, hence the government was in no position to file an accusation until after that time. We think this makes no difference. *While Washington appears to have no statute on the subject, in that state, as elsewhere in this country, it is the duty of a peace officer who has effected an arrest without a warrant promptly to take the person arrested before a magistrate. This directive is not something which the officer is free to comply with or ignore according as he may think the exigencies of the situation demand; it is a fundamental imperative designed to safeguard the individual in a free land against the arbitrary exercise of power.*" (Italics supplied.)

This Court's further consideration of the case suggests the proper definition of the applicable Washington statute in its citation of *Housman v. Byrne*, 9 Wash. 2d, 560; 115 Pac. 2d, 673; and *Ulvestad v. Dolphin*, 152 Wash. 580; 278 Pac. 681.

The recitation by way of argument in the appellant's Brief as to the sympathetic and kind treatment afforded to appellee, from which appellant launches its attack on the Court's findings, is well considered and disposed of by the opinion of this Court in *Gros v. U. S.*, 136 F. 2d, 878.

It is not enough to say that *Gros* can be distinguished by reason of its consideration under Federal procedural rules. The all important element of consideration in

that case is primarily the psychological coercion which was employed, and psychological coercion knows no bounds of procedural limitation or distinction. In *Gros* the prisoner was held in a cell of the F. B. I. in the Field Office Building of the Bureau in Los Angeles, California. He was interrogated over a period of five days, but was not abused and no harm was inflicted upon him other than confinement. The prisoner was regularly taken to a restaurant for his meals and was questioned without rudeness of manner. There was no physical abuse inflicted upon Dr. Gros, but this Court speaking to that situation, stated in part before reversing the conviction:

> " 'Appellant's belief that his imprisonment in the cell seemed like the Gestapo methods of which he had heard in Germany, is based upon a warrantable inference. No stronger facts need be stated to show the lack of evidentiary value in Anglo American jurisprudence of a confession so pressed from a cell-confined man over a period of five days.' "

SPECIFICATIONS OF ERROR 7, 8, 9

C. Answer to specifications of Error Nos. 7, 8, and 9. The answer by way of argument to these specifications of error will likewise include specifically the reasons why appellee believes that this Court should sustain the decision of the Honorable United States District Judge. The United States District Court properly assumed jurisdiction. Appellee here had exhaust-

ed state remedies. See *Giron, et al, v. Cranor,* supra. The same argument which appellant makes here that the District Judge could not reexamine findings of fact of state tribunals was made in the recent case of *U. S. ex rel Elliott v. Hendricks,* 213 F. 2d, No. 5 (advance reports), page 922. In that case the State of Pennsylvania was joined in a Brief by the Attorneys General of forty other states, and the opinion disposes of appellant's objections here about the lack of jurisdiction in the United States Judge. The Court held that the problem for the appellate Court was to determine whether things which had been done in the State Court prosecution were so unfair that the defendant had been deprived of his rights under the Federal Constitution. Appellant contends that the question decided by the United States District Judge was solely a question of fact and that thus a state jury was entitled to determine whether a confession was obtained under the influence of fear produced by threats. Appellant relies almost completely upon decisions of the Supreme Court of the State of Washington as being decisive of this issue. Such is not the law, as Congress has ample authority to authorize the Federal judiciary to test the question of whether one confined under State process is in such confinement deprived of his rights under the Federal Constitution. See *U. S. ex rel Elliott v. Hendricks,* supra.

Likewise, all that is said in *Schechtman v. Foster* (cited by counsel), 172 F. 2nd 339, is that due process of law does not mean infallible process of law. The United States District Judge, in accord with established authority of law, *Elliott v. Hendricks,* supra, could redress violations of the Constitution. Further authority and precedent is established in:

Lisenba v. California, 314 U. S. 219;
Malinski v. New York, 324 U. S. 401, 404.

The Supreme Court of the United States has said in a number of cases that if a coerced confession is admitted in evidence, the judgment of conviction must be set aside, even though the evidence, apart from the confession, might have been sufficient to support a finding of guilt.

Lyons v. Oklahoma, 322 U. S. 596;
Stroebel v. California, 343 U. S. 181;
Malinski v. New York, supra.

Appellant, by way of comparison of the Washington and New York procedure, relies on *Stein v. New York*, 346 U. S. 156 (see page 25 Appellant's Brief). The *Stein* case has been discussed in connection with the Fourteenth Amendment and the Third Degree in a recent article appearing in the *Stanford Law Review.* See: *The Fourteenth Amendment and the Third Degree, Stanford Law Review,* May, 1954; Vol. 6, No. 3. The author of that article suggests that the case raises

anew the entire problem of when the Supreme Court will reverse conviction on "coerced confession" grounds. Under New York procedure (a similar procedure is employed in the State of Washington) if the Court finds that the confession was not voluntary he must exclude it, but where he believes that there is an issue of fact as to whether the confession was coerced, then such confession and the evidence with reference to the manner in which it was obtained may be submitted to the jury under, of course, a cautionary instruction that the confession must not be used in determining guilt or innocence, unless it be found that it was voluntarily given. The trial Judge in the *Stein* case submitted the evidence to the jury after a determination that it was a jury issue. There was substantial evidence other than the confession which pointed to the defendant's guilt. The verdict of guilty was affirmed by the Appellate Court without opinion and it was not possible to determine whether the jury had found the confession to be coerced and rejected it, but found that the other evidence established guilt, or whether the confession had been found to be voluntary and was relied on by the jury in reaching the verdict.

The author in the *Stanford Law Review* treats of apparent difficulties posed by the *Stein case,* but he distinguishes that case by saying that the questioning in *Stein* was only intermittent and that time had been allowed for food and rest between the sessions of ques-

tioning. Although the author thinks that there was in *Stein* a shift in attitude, he does state "some of the results in future decisions will be similar to outcomes of the past." The author in the article concludes that the confession cases are the result of the application of two Constitutional standards. (1) That a conviction cannot stand when based on a confession which has been extracted by police methods which create too great a danger of falsity. With respect to that standard he says that the means used must be considered in relation to the defendant and his probable power of resistance. (2) The author contends that a conviction will be reversed when the confession was obtained by methods which in themselves offend due process, and that in the second no inquiry into the probable falsity is relevant.

It is respectfully contended that the application of the standards suggested would justify support of this Court's affirmance of the opinion of the United States District Judge, even were this inquiry confined to the application of the *Stein* case. The *Stein* case can logically be distinguished. See *Stanford Law Review*, supra, and the discussion of the case by the United States District Judge in the instant cause. (Tr. 225-228 inclusive.) It is suggested, however, that the Supreme Court of the United States has in a recent decision, as indicated by the *Law Week's Summary & Analysis, Pocket Edition*, August 3rd, 1954, No. 78,

withdrawn any arguable position for the appellant's claimed vitality of the *Stein* doctrine as relating to inquiry of a Federal Court under the circumstances of this case.

Leyra v. Denno, -US-., 98 L. ed. (Advance p.-) Vol. 98, No. 16, Advance Reports of the Supreme Court, p. 631 (June 1954), was a case that came up from New York, as did the *Stein* case, and it was a case where certain confessions were submitted to the jury, as in the *Stein case.* In the first trial in *Leyra* the Appellate Court had reversed on the ground of the use of a coerced confession. In the second trial only confessions which followed the first were used, and the trial Court submitted to the jury the question of their voluntariness. Denial of petitioner's writ for habeas corpus was made by the United States District Judge and affirmed by the Court of Appeals for the Second Circuit. The Supreme Court of the United States, per Mr. Justice Black, reversed, holding that the undisputed facts in the case were irreconcilable with petitioner's mental freedom, "to confess to or deny a suspected participation in a crime." The decision of the Supreme Court of the United States in this case makes the proposition undeniable that the philosophy of the Court as to due process which has been consistenly propounded by Mr. Justice Black and Mr. Justice Douglas, and which has been further crystalized by other members of the Court (see *Stanford Law Re-*

view, supra) is still on the side of meticulous protection against untrustworthiness in coerced confessions, regardless of the character of that coercion. The dissent in *Leyra* squarely presents the issue of the effect of the *Stein* case. Mr. Justice Minton, with Mr. Justice Reed and Mr. Justice Burton, dissented, stating specifically:

> "It is not our function to set aside state court convictions on the ground that the verdict is against the weight of the evidence. *Stein v. New York,* 346 U. S. 156, 180, 97 L. ed. 1522, 1540, 73 S. Ct. 1077."

The opinion further states:

> "New York must be mystified in its efforts to enforce its law against homicide to have us say it may not submit a disputed question of fact to a jury. The Court holds that to do so denies due process."

The doctrine contended for by appellant in *Stein* was squarely presented and disposed of. It is respectfully urged that the United States District Judge had the authority, the duty and obligation of deciding this cause; and that in view of the facts and circumstances of this case analyzed in accord with the recent and last ruling of the Supreme Court of the United States, the United States District Judge properly disposed of the matter in accord with the rules and substantive law as defined by the Supreme Court of the United States.

CONCLUSION

We respectfully submit that the Court should affirm the order of the United States District Judge for the reason that the Court had jurisdiction to hear and decide the constitutional question presented and for the further reason that the Court properly decided that question within the limits imposed upon Court inquiry in accord with the authorities heretofore reviewed.

Respectfully submitted,

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